90-1743

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL ADVERTISING COMPANY, a Delaware Corporation, subsidiary of Minnesota Mining and Manufacturing, a Delaware Corporation,

Petitioner,

vs.

THE VILLAGE OF DOWNERS GROVE, an Illinois municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Whether respondent's 1987 zoning ordinance violates the first amendment to the Federal Constitution.

2. Whether respondent's zoning ordinance constitutes a taking and requires compensation under the fifth amendment.

3. Whether respondent's zoning ordinance violates petitioner's due process rights under the fourteenth amendment.

4. Whether substitution of the 1987 amended ordinance for the 1983 ordinance violated petitioner's fourteenth amendment due process rights.

5. Whether the Illinois appellate court's failure to recognize the interim settlement agreement violated Article 1 of the Federal Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner National Advertising Company was the petitioner before the Supreme Court of Illinois. Petitioner is a Delaware corporation and a wholly owned subsidiary of Minnesota Mining and Manufacturing, also a Delaware corporation.

Respondent before this Court, the Village of Downers Grove, was one of the respondents before the Supreme Court of Illinois. The Village of Downers Grove Zoning Board of Appeals and its individual members, Gregory Beggs, Anthony Tonz, Eugenia Kucera, Laurence Musielak and Harold Slagter were respondents before the Supreme Court of Illinois. No relief is sought in this petition against the zoning board or its members.

Additionally, Opus Corporation and LaSalle National Bank as Trustee under Trust No. 101123 and 102630 were parties to the proceeding in the trial court. They were not parties to any appellate proceedings.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

PRAYER

Petitioner National Advertising Company respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois.

OPINION BELOW

The opinion rendered in this cause by the Appellate Court of Illinois, Second District, is reported at 204 Ill. App. 3d 499 (1990). See Appendix A.

JURISDICTION

On October 10, 1990, the Illinois Appellate Court affirmed the decision of the DuPage County Circuit Court against petitioner. Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court. The Illinois Supreme Court denied the petition for leave to appeal on February 6, 1991. See Appendix B. This petition is filed within ninety days of the order denying the petition for leave to appeal and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitution of the United States of America, **ARTICLE I, Sec. 10-1:**

No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

B. Constitution of the United States of America, **FIRST AMENDMENT:**

Congress shall make no law . . . abridging the freedom of speech. . . .

C. Constitution of the United States of America, **FIFTH AMENDMENT:**

. . . nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

D. Constitution of the United States of America, **FOURTEENTH AMENDMENT:**

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

E. **1983 DOWNERS GROVE Zoning Ordinance:**

Article III-*Rules and Definitions*

Sign Advertising: A sign that directs attention to a business product or activity available or conducted at a location other than the zoning lot upon which such sign was located or that directs attention to a noncommercial message or idea not directly related to an activity conducted on such zoning lot.

Article IX-*Signs* (See Appendix C)

F. **Amended DOWNERS GROVE Zoning Ordinance** (See Appendix D).

G. "Interim Settlement Agreement executed December 14, 1984 . . .

* * *

"NOW, THEREFORE, IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

* * *

"*Section 4:* In the event it is finally determined by this Court (or the Illinois Appellate Court, the Illinois Supreme Court or the United States Supreme Court, in the event of appeals) that the ordinances of the Village which regulate the signs described hereinabove are unconstitutional, void, beyond the authority of the Village, or for any other reason invalid,

"National shall be permitted to maintain such signs or to modify them in accordance with the final ruling or judgment entered in this case, or in accordance with valid requirements of any ordinances adopted by the Village in response to such final determination.

"*Section 5:* This is an Interim Settlement Agreement. The erection of the signs as set forth hereinabove is being authorized by the Village for the sole purpose of mitigating possible damages during the pendency of this action so that a full judicial determination as to the validity of the applicable Village ordinances may be had in a manner that is equitable to both parties. The parties recognize that, in effecting this Interim Settlement Agreement, certain procedural requirements of the Village, sometimes referred to as administrative remedies, including but not limited to, formal application for Village sign or building permits, requests for ordinance text amendments, variations or special uses, are, as to these signs only, obviated and avoided by the negotiation

and execution of this Interim Settlement Agreement. National will submit to the Village certificates of its structural engineer and its electrician, certifying that the sign installation are, or will be, in compliance with the Village requirements for structure, foundation and electrical wiring. National recognizes that, except as set forth herein, nothing in this Agreement and authorization shall be construed as a waiver by the Village of any rights or defenses with respect to the validity of said ordinances and other matters raise in this litigation."

STATEMENT OF THE CASE

Petitioner sued respondent challenging the constitutionality of its outdoor sign ordinance. It also sought judicial review of a decision by respondent's zoning board of appeals denying a variance from the size restrictions contained in the ordinance.

Petitioner is engaged in the business of outdoor advertising. In 1983, petitioner leased properties near a highway in respondent's B-3 and M-1 zoning districts and applied for permits to erect double faced 14 by 48 foot or 20 by 60 foot outdoor advertising signs.

Because the proposed signs exceeded the size restrictions of the local ordinance petitioner was denied a sign permit. Likewise, the application for a variance was also denied.

Petitioner then filed a four count complaint. Only Counts III and IV are involved in this petition. Count III alleged that the zoning ordinance in effect in 1983 violated the first amendment to the United States Constitution as a

content-based regulation. That ordinance only permitted political non-commercial messages.

Respondent amended the ordinance in 1987 so as to purportedly allow all non-commercial copy. Petitioner asserted in Count III that the Village improperly amended the ordinance. Petitioner also contended that the amended ordinance violated the first amendment.

Count IV alleged a violation of due process under the fourteenth amendment in that respondent had no rational basis for the size restrictions contained in the ordinance and a taking under the fifth amendment as going too far.

In January, 1985 the parties entered into an interim settlement agreement that permitted petitioner to erect three signs, one in the B-3 district and two in the M-1 district.

As is relevant to this appeal the trial court found the 1987 ordinance valid; that the 1987 not the 1983 ordinance applied; and that respondent was entitled to summary judgment on all issues.

On appeal, the Appellate Court of Illinois, Second District, held *inter alia*, that the 1987 amendment applied; that the ordinance did not violate the first amendment; that the ordinance was a proper time, place and manner restriction; that the due process clause did not provide more protection to petitioner's business than the first amendment; and that the ordinance did not result in a taking in violation of the fifth amendment.

STATEMENT OF FACTS

Petitioner, as previously described, is engaged in the outdoor advertising business and owns a substantial number of outdoor advertising signs (R. 556; 1122). The term "off-premise" refers to signs which convey a message related to a business, service or charity not conducted on the zoning lot where the sign is located. "On-premise" signs refer to business identification signs located on the same zoning lot as the identified business or activity (R. 96).

In 1981, the DuPage County Circuit Court in *Village of Downers Grove v. Clark*, 78 CH 422 (Eighteenth Judicial Circuit, DuPage County, Wheaton, Illinois 1978), ruled that the Illinois Highway Advertising Control Act (Ill. Rev. Stat., ch. 121, pars. 501-516) ("HACA") pre-empted local advertising ordinances. (R. 1170, 1171).

In 1983, respondent amended its ordinance to prohibit all off-premise signs in all commercial or industrially zoned districts except the B-3 district (R. 96-98). Under the ordinance and where allowed, off-premise signs may not exceed 20 feet in height and 200 square feet in area (R. 96-98). On-premise signs are permitted to exceed 20 feet in height and 200 square feet (R. 98; 1184); and are only limited by the lot's frontage (R. 97, 98).

In 1983, petitioner applied for permits to construct four off-premise signs on four separate properties zoned for commercial or industrial use (R. 377; 448; 577). When the applications were filed they complied with HACA and all lawful requirements of the ordinance (R. 87-99).

The Arun property, in a B-3 District, was to contain a 14 by 48 foot sign (R. 558). The Madden, Stillwell and

Potts Properties, in M-1 Districts, were to contain 20 by 60 foot signs (R. 566). The petitioner obtained required permits from the Illinois Department of Transportation ("IDOT") (R. 561; 565).

On December 14, 1984, the parties entered into an interim settlement agreement (R. 377-383). On January 16, 1985, the circuit court entered an order approving the agreement and allowing the parties to proceed with the litigation pursuant to the terms of the agreement.

Under the interim settlement agreement, petitioner was permitted to build and maintain signs on the Arun, Madden and Stillwell properties that exceeded the square footage limitations of the local ordinance but complied with HACA (R. 378-380). In return, petitioner waived its potential damage claims against respondent (R. 380).

Under the agreement, if respondent's 1983 ordinance was held valid, petitioner would remove the signs (R. 380). If respondent's 1983 ordinance was found invalid, petitioner could maintain its signs or modify them in accordance with any final court ruling or in accordance with any valid ordinance adopted in response to the contemplated final judicial determination (R. 381).

The Arun, Stillwell and Madden signs are adjacent to Interstate 88 ("I-88"), a six-lane, controlled-access highway (R. 448; 450). The Potts sign was to be erected adjacent to Interstate 355 ("I-355"), also a six-lane, controlled access highway (R. 565). All of the signs are oriented to travellers on the respective highways (R. 566).

The Madden and Stillwell locations contain automobile dealerships. The Arun location houses a discount mail order house (R. 1128). The three properties and various large on-premise signs located thereon are all visible from

I-88 (R. 1128). On-premise signs on the Arun property alone exceed 3,700 square feet (R. 1128).

On these properties and in their vicinities are many other man-made structures including radio antennas, power lines, elevated tollway ramps, water towers and large office and commercial buildings, many of which have signs attached to them (R. 1128, 1129).

In addition to construction costs, Plaintiff expended in excess of $39,000.00 for selecting the locations, obtaining ground leases and for drafting, planning and engineering the signs (R. 1129).

On interstate highways such as I-88 and I-355, petitioner customarily uses standard, easily visible display faces: 14 by 48 foot (672 square feet), and 20 by 60 foot (1200 square feet) (R. 1133, 1134). These standard sizes are recognized both in the Federal Highway Beautification Act ("HBA") and the HACA. Signs of the limited height and size described in respondent's 1983 (and 1987) ordinance are neither made nor used in respondent's industry (R. 1135).

Petitioner's signs are available to anyone wishing to purchase advertising space. They convey numerous messages and information, regardless of content (R. 1137, 1138).

Petitioner frequently makes space available for speech at reduced rates, and sometimes at no cost at all (R. 1137). Such discount rate advertisers include the League of Women Voters, the Boy and Girl Scouts of America, the March of Dimes, the American Red Cross, the Chicago Museum of Science and Industry, and similar organizations (R. 197; 200; 203; 205; 210; 1137). During 1988, petitioner's donations of public service, display space to such organizations totalled $2,211,765.00 (R. 1139).

In 1983, petitioner applied for building permits for its signs. Upon denial of the permits it applied for variances from the 1983 ordinance for the Arun sign. On June 22, 1983, the zoning board of appeals held a public hearing and denied the variances (R. 1379-1388). With respect to the other signs, the parties have stipulated that petitioner properly exhausted its administrative remedies (R. 381-382). Petitioner then sued in the DuPage County Circuit Court seeking administrative review, declaratory and injunctive relief, and damages alleging that the 1983 ordinance was void and unenforceable (R. 555). After several amendments to the complaint, petitioner moved for summary judgment in 1986, claiming in its third amended complaint that: (a) the 1983 ordinance had been preempted by HACA (Count II); and (b) the 1983 ordinance violated petitioner's first amendment rights (Count III) (R. 429-435).

The circuit court granted petitioner's motion on the preemption issue in December, 1986 (R. 432). Respondent moved to have the circuit court certify its ruling on preemption to perfect an interlocutory appeal (R. 432-435). The trial judge granted respondent's motion but refused to rule on petitioner's motion for summary judgment on its first amendment claim so that both issues could be consolidated for appeal (R. 433).

In March, 1987, with both the interlocutory appeal and petitioner's first amendment summary judgment motion pending, respondent amended the 1983 ordinance as to its content restrictions and the definition of "Advertising Sign" (R. 101-107). Respondent's 1987 amendment was an attempt to avoid similar first amendment challenges to the 1983 ordinance made by another litigant (R. 683-685; 715, 716; 1231).

In 1988 the Illinois Appellate Court, Second District, held that HACA did not pre-empt the height and size restrictions in the 1983 ordinance. *National Advertising v. Downers Grove*, 166 Ill. App. 3d 58 (1988), appeal denied, 121 Ill. 2d 572 (1988). After remand, petitioner renewed its summary judgment motion on its first amendment claim. Respondent filed a cross-motion on the same issue (R. 12; 175).

Petitioner's first amendment claim challenged the 1983 ordinance which had been in effect when it filed its permit applications and upon which it had based its complaint. Respondent, on the other hand, defended the amended ordinance (R. 12; 175).

Petitioner argued: (a) the 1983 ordinance was void because it was basically identical to that struck down by this Court in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); and (b) that respondent was estopped from applying the amended ordinance (R. 395).

The circuit court ruled that the 1987 amended ordinance governed the first amendment claim. Petitioner was granted leave to amend (R. 652; 1494-1497), and filed its fourth amended complaint June 1, 1989 (R. 681).

Count I sought administrative review of the denial of the variances for the Arun sign (R. 682). Count III alleged that the 1983 ordinance as well as the 1987 ordinance violated petitioner's first amendment rights (R. 683-690). Count IV alleged a violation of due process and an unfair taking (R. 690-693). The circuit court never ruled whether the 1983 ordinance or the 1987 amendment applied to Count IV (R. 1545-1547).

Respondent moved to dismiss petitioner's administrative review action (Count I) on July 19, 1989. At the same time

respondent moved for summary judgment on the first amendment (Count III) and the due process-taking (Count IV) issues (R. 735; 831). Respondent presented no affidavits or other evidence to support its entitlement to summary judgment.

Petitioner countered respondent's motion for summary judgment with affidavits of experts in land use, traffic safety, appraising and media. Petitioner's expert witnesses demonstrated that the signs which were built in 1985 are consistent with existing uses in the area and have an inconsequential effect on the aesthetics of the area (R. 1175, 1176; 1183-1185).

Petitioner's traffic safety expert concluded that the signs had no adverse impact on traffic safety (R. 1191, 1192) and had not been the cause of any traffic safety problem (R. 1126). Petitioner's real estate appraiser testified that the signs added value to the parcels he examined (R. 1258-1263).

Notwithstanding respondent's failure to present contrary evidence, the circuit court, on September 7, 1989, granted summary judgment for respondent on petitioner's due process and taking claims without giving any reasons for its decision (Count IV) (R. 1356; 1548). On November 14, 1989 the circuit court granted respondent's motion to dismiss petitioner's administrative review action (R. 1434, 1565).

Petitioner then perfected an appeal to the Illinois Appellate Court, Second District.

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISION IN *METROMEDIA, INC. v. SAN DIEGO*, 453 U.S. 490 (1981).

The decisions below conflict with the holding of this Court in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). In *Metromedia*, this Court considered San Diego's ordinance, exempting from a general ban on billboards, all onsite commercial advertisements. In finding the San Diego ordinance unconstitutional, this Court reached three significant conclusions. It held that San Diego was free to place greater value on the interests underlying onsite commercial advertising than on the traffic safety and aesthetic interests underlying the general ban on billboards. 453 U.S. at 512. It held that the city could exempt onsite commercial signs from the general ban on billboards. 453 U.S. at 512. Finally, this Court held that San Diego could not prohibit the display of noncommercial messages in places where commercial messages were permitted. 453 U.S. at 536.

In the instant case, the respondent's amended ordinance purports to allow noncommercial messages in addition to onsite commercial messages in all zoning districts except the B-3 district. In fact, all non-commercial messages are prohibited in all commercial and industrial zones except in the B-3 district.

The constitutional defects in the amended ordinance are threefold. First, it prohibits the display of all noncommercial messages in zones where onsite commercial messages are permitted. This result is specifically prohibited by

Metromedia. Second, the ordinance is not a proper time, place or manner restriction because it is not content neutral. Third, the ordinance is vague and overbroad.

A. THE AMENDED ORDINANCE VIOLATES THE FIRST AMENDMENT BECAUSE IT BANS NONCOMMERCIAL SPEECH IN AREAS PERMITTING COMMERCIAL SPEECH.

The amended ordinance includes a number of definitions including the definition of "advertising sign" which is:

> "A sign that directs attention to a business product or activity available or conducted at a location other than the zoning lot upon which such sign was located or that directs attention to a noncommercial message or idea not directly related to an activity conducted on such zoning lot."

Nearly all other signs are defined in terms of their mechanical components. For example, canopy, flashing, freestanding, moving, etc.

Under the provisions of respondent's zoning ordinance, and except in the B-3 district, all signs are subject to the following "content" limitation:

> "Except for signs containing noncommercial copy of any nature, content of signs shall be limited to the business, product and activity available or conducted on the zoning lot."

On its face, this content restriction allows onsite commercial copy and purports to allow onsite or offsite noncommercial copy. But, reading the ordinance as a whole, noncommercial speech is effectively banned.

By definition, all messages not directly related to an activity conducted on the zoning lot where the sign appears are "advertising signs". But, advertising signs are

not allowed in any zoning district except the B-3 district. (See Appendix D). Accordingly, under the ordinance, all messages, commercial and noncommercial, "not directly related" to an activity conducted on the zoning lot where the sign appears are banned in all commercial or industrial zones except one.

In reality, noncommercial copy directly related to an activity conducted on the lot where the message appears does not exist. For example, a business owner in a zone other than B-3 wishes to put up a sign saying "save the whales." Unless the business is in the business of saving whales, such a sign is an advertising sign by definition. Since advertising signs are not permitted, except in the B-3 zone, the "save the whales" message is banned. Accordingly, respondent's amended ordinance violates *Metromedia* because it prohibits noncommercial speech in areas where commercial speech is allowed.

B. THE AMENDED ORDINANCE IS NOT PROPER AS A TIME, PLACE OR MANNER RESTRICTION BECAUSE IT IS NOT CONTENT NEUTRAL, NOT NARROWLY TAILORED, AND LEAVES NO ALTERNATIVE CHANNELS FOR COMMUNICATION OF BILLBOARD MESSAGES.

The law is well established that a government "may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *United States v. Kokinda*, ____ U.S. ____, 110 S. Ct. 3115, 3126 (1990). Respondent's amended ordinance fails all three tests.

First as previously explained, all noncommercial speech is prohibited except in the B-3 district. Since the content of the noncommercial speech is controlled by the activity on the zoning lot, the ordinance is not content neutral.

For similar reasons, the ordinance is not narrowly tailored and fails to leave any alternative channels of communication because it bans all offsite signs in areas where commercial signs are allowed. This shows that the amended ordinance is overbroad and is not "narrowly tailored". Also because the ordinance eliminates virtually all noncommercial messages in all but the one district, ample alternative channels for noncommercial speech are nonexistent. Accordingly, the ordinance fails all three prongs of this Court's time, place, or manner tests.

C. THE AMENDED ORDINANCE VIOLATES THE FIRST AMENDMENT BECAUSE IT GRANTS MUNICIPAL OFFICIALS IMPERMISSIBLY BROAD DISCRETION TO DECIDE WHAT SPEECH TO PERMIT.

The term "noncommercial copy" appears as a content-based exclusion in the section of the ordinance where permitted sign content is defined. In areas zoned R-1 through R-6, "content" is defined as follows:

> "*Content*: Except for signs containing noncommercial copy of any nature and rummage or garage sale signs, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot."

This content-based exclusion is similar in areas zoned B-1, B-2, M-1, M-2, O-R and O-R-M:

> "*Content*: Except for signs containing noncommercial copy of any nature, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot."

Finally, "advertising signs" are added as a content-based exclusion in the B-3 district:

> "*Content*: Except for signs containing noncommercial copy of any nature and advertising signs, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot."

"Advertising sign" as previously explained is defined as a sign directing attention to any message "not directly related to an activity conducted on such zoning lot".

Laws regulating speech-related activities are unconstitutional if they are too vague to make absolutely clear what they permit or forbid. The first amendment serves as a strong impediment to schemes giving public officials broad discretion to decide what types of speech a municipality can permit or forbid.

Of course, the constitutional defect rendering the ordinance void for vagueness is that respondent fails to define the terms "noncommercial", or "commercial" anywhere.

Since respondent's sign ordinance employs content-based restrictions containing critical but undefined terms such as "noncommercial copy" and "noncommercial message", such vagueness gives local officials broad discretion to decide which speech to allow and which to prohibit. As a result, the ordinance prohibits or at least exerts a "chilling effect" on constitutionally protected speech. Accordingly, the courts below incorrectly held respondent's amended ordinance to be constitutional.

D. RESPONDENT'S ORDINANCE FOR THE B-3 DISTRICT IS CONSTITUTIONALLY IMPERMISSIBLE BECAUSE IT FAVORS AND ENCOURAGES COMMERCIAL SPEECH AT THE EXPENSE OF NONCOMMERCIAL SPEECH.

As previously argued, signs in the B-3 district are subject to a "content" restriction different than the restriction imposed on all other zones as follows:

> "*Content*: Except for signs containing noncommercial copy of any nature and advertising signs, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot."

That difference is the addition of "advertising signs" to the exception from the content restriction. Thus, offsite commercial and noncommercial messages are permitted. Further, the B-3 district is the only district in which advertising signs are allowed.

But under the restrictions placed against advertising signs, such signs are limited to 200 square feet. On the other hand, onsite commercial messages are limited in size only by the amount of frontage. Accordingly, in the B-3 district, the amended ordinance restricts noncommercial speech to 200 square feet but permits commercial speech to a much greater extent.

The Arun property is zoned B-3. Signs on the Arun property exceed 3700 square feet. A 200 square foot sign containing a noncommercial message would be lost. The amended ordinance, thereby, favors commercial speech over noncommercial speech. It allows for and encourages commercial speech while discouraging, through unreasonable size restrictions, noncommercial speech. This result is constitutionally improper because noncommercial speech

is afforded greater first amendment protection than is commercial speech. The Illinois courts erred in finding the amended ordinance to be constitutional.

II.

THE ISSUE OF REGULATORY TAKING IS A MATTER OF NATIONAL SCOPE AND INTEREST. THE DECISIONS OF THE COURTS BELOW IN THIS CASE HAVE RENDERED THIS QUESTION RIPE FOR THIS COURT'S REVIEW.

On four occasions, this Court has sought to resolve the dual issue of whether governmental regulations can go so far as to amount to a taking requiring just compensation under the fifth amendment. The alternative issue, whether such regulations violate fourteenth amendment due process rights, requiring invalidation of the regulation is discussed in the next section.

This Court has recognized the existence of taking-due process issues in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985), *San Diego Gas & Electric v. San Diego*, 450 U.S. 621 (1981), and *Agins v. Tiburon*, 447 U.S. 255 (1980). Yet, this Court has not addressed this question because in each case it found the petitioner's claim to be premature. In *Williamson County Regional Planning v. Hamilton Bank*, this Court stated that for such a claim to be ripe, two requirements must be met. First, to determine if a regulatory taking has occurred, the party alleging the taking must have a final decision regarding the application of the zoning ordinance to its property. 473 U.S. at 186-94. Second, the party claiming the taking must have utilized the procedures available under state law to request, and be denied, just compensation. 473 U.S. at 194-97.

In the case at bar, both of these elements are satisfied. First, the petitioner has obtained a final decision as to how the ordinance will be applied to its property. Petitioner applied for a building permit which was denied. Petitioner then applied for a variance which was also denied. Petitioner challenged this action in court and lost. In fact, both parties stipulated that petitioner exhausted its administrative remedies. The final result is that petitioner can only erect advertising signs so small as to be economically useless, thereby destroying petitioner's investment-backed expectations.

The second requirement is that an attempt to obtain compensation has failed. Count IV of petitioner's complaint alleged an unfair taking in violation of the fifth amendment. On September 7, 1989, respondent obtained summary judgment without explanation. On October 10, 1990, the appellate court affirmed. The Illinois Supreme Court affirmed the appellate court decision on February 6, 1991 when it denied petitioner's petition for leave to appeal. Accordingly, the petitioner has sought, and been denied, just compensation for the taking.

The appellate court denied compensation on the basis that no taking had occurred. That court erroneously ruled that a taking had not occurred, and relied on three faulty arguments to support its decision. First, the court glossed over the aspect of a regulatory taking, and stated that respondent never physically invaded petitioner's property. The court further reasoned that because petitioner was a lessee and not the owner of the underlying realty, there was no denial of an economically viable use of the land to the owner. Finally, the court said that petitioner's legitimate investment-backed expectations had not been interfered with because petitioner had notice that its intended use was not allowed under the then existing zoning ordinance.

Those statements of the law are simply wrong. Physical invasion is not a prerequisite to a taking. This Court has stated that a regulatory taking can occur where the regulation has in substance taken the property, i.e., when the regulation "goes too far." *MacDonald*, 477 U.S. at 348, *citing Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Also, ownership in fee is not required. This Court has found that a compensable taking occurs even where the interest is a leasehold. *United States v. General Motors*, 323 U.S. 373 (1945). Finally, the determination that petitioner had notice that its intended use was impermissible is unfounded. First, the ordinance in question was unconstitutional under *Metromedia*. Second, the proposed use was permitted in 1983 under HACA.

III.

THE ISSUE OF STATE REGULATION THAT GOES TOO FAR IN VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IS NOW RIPE FOR REVIEW.

This case presents two separate fourteenth amendment due process questions. First, was the 1983 zoning ordinance violative of petitioner's substantive due process rights because it was unreasonably related to the defendant's stated goals of aesthetics and traffic safety? Second, did retroactive application of the 1987 amended ordinance violate petitioner's substantive due process rights by substantially impairing a vested right in an unreasonable manner?

Although the Illinois courts were presented with these due process issues they were barely discussed by those courts. To the extent due process was discussed, the appellate court lumped the issues together and then categorically disposed of them.

The appellate court's due process analysis consisted of a reference to footnote 25 of the *Metromedia* decision. In that footnote, this Court commented that due process affords a business no greater protection than the first amendment. 453 U.S. at 520. The appellate court took that to mean that since it did not accept the first amendment argument, it did not need to consider the due process issues. This was error because petitioner's due process claims do not focus on the content of speech, but rather the reasonableness of the ordinance, the destruction of petitioner's economically viable use of its property, and the destruction of its investment-backed expectations.

A. MATERIAL ISSUE OF FACT EXISTS AS TO WHETHER RESPONDENT'S ORDINANCE IS RATIONALLY RELATED TO ITS STATED PURPOSES.

The first due process issue is whether both the 1983 and the 1987 amended ordinance violated petitioner's substantive due process rights. It is accepted that where a party challenges the validity of an ordinance which does not affect a fundamental right, the ordinance will withstand the constitutional challenge if it is rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). The interest here is petitioner's right to use its property in a viable and economically sound manner in furtherance of its investment-backed expectations.

The goals stated in respondent's ordinances were aesthetics and traffic safety. In opposition to respondent's motion for summary judgment, petitioner presented expert testimony that the ordinance would not improve the aesthetics of the area, nor would it improve traffic safety. The evidence also showed that the ordinance would have a substantial negative impact on petitioner's business. Peti-

tioner's evidence indicated that neither ordinance would produce the desired results, but would substantially diminish the value of petitioner's property and destroy its investment-backed expectations. See *Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172, 197-200.

Respondent presented no evidence to support its motion for summary judgment or to challenge petitioner's expert testimony. Accordingly, petitioner demonstrated material issues of fact which were not overcome by respondent. Where there is a genuine issue of material fact, summary judgment is not appropriate. *Amalgamated Trust & Savings v. Silha*, 121 Ill. App. 3d 1033 (1st Dist 1984). Accordingly, the lower courts erred in granting and upholding respondent's motion for summary judgment on this due process claim.

B. THE ILLINOIS COURTS' IMPROPER APPLICATION OF THE 1987 AMENDED ORDINANCE VIOLATED PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY SUBSTANTIALLY INTERFERING WITH PETITIONER'S VESTED RIGHTS IN AN UNREASONABLE MANNER.

The second due process issue is whether retroactive application of the 1987 amended ordinance violated petitioner's substantive due process rights by substantially impairing a vested right in an unreasonable manner. The answer to this question requires analysis of three separate questions. First, was there a vested right? Second, was the right substantially impaired? Third, was the impairment of the right unreasonable under the circumstances?

In Illinois, property rights vest at the time a permit application is filed, so long as the application involves a permitted use. *Fifteen Fifty State St. v. Chicago*, 15 Ill. 2d 408, 416 (1959), *citing Deer Park Civic Ass'n v. City*

of Chicago, 347 Ill. App. 346 (1952). Petitioner's application was for a permitted use and complied with the requirements of HACA (the controlling preemptive statute under Illinois law in 1983). Accordingly, petitioner's rights vested at the time of filing.

And, notwithstanding the permit application, the execution of the interim settlement agreement clearly vested petitioner's rights, either by obligation of contract or estoppel. *Fifteen Fifty State St.*, 15 Ill. 2d at 416.

Petitioner's vested right was to use the property with signs conforming to HACA, subject to a condition subsequent. The condition subsequent which would divest that right was a final determination that the 1983 ordinance was constitutional.

The second question is whether petitioner's vested right was substantially impaired. Petitioner's vested rights will be destroyed if the appellate court decision is allowed to stand. The Illinois courts determined that the 1987 amended ordinance controls the outcome of the dispute and substituted it for the 1983 ordinance. The 1987 ordinance was enacted after the interim settlement agreement, and designed to overcome the 1983 ordinance's constitutional failings. Substituting the 1987 amended ordinance for the 1983 ordinance unfairly and unreasonably biased the litigation in favor of respondent.

The third question is one of reasonableness under the circumstances. The general rule is that a municipality may amend an ordinance even if it is in litigation, with the resultant amendment applying to the litigation. *Gust v. Village of Skokie*, 125 Ill. App. 3d 102 (1984). Under the circumstances here, such an application of the general rule is unreasonable and unfair.

Based on the undisputed facts, the interim settlement agreement controls the fate of the signs at issue in this

litigation. Petitioner made calculated assumptions regarding the likelihood of success and revenue that could be generated during the course of litigation. On this basis and in consideration for the permission to erect signs conforming with HACA, petitioner waived its future damage claim. Moreover, respondent was aware of these considerations because it agreed to the interim settlement agreement to mitigate damages. It would be simply unfair and unreasonable to allow respondent to benefit from petitioner's damage waiver and then allow it further benefit by changing the rules in mid-stream to bias the litigation in respondent's favor.

IV.

THE ILLINOIS COURTS' FAILURE TO GIVE EFFECT TO THE INTERIM SETTLEMENT AGREEMENT RESULTED IN A VIOLATION OF THE OBLIGATION OF CONTRACTS CLAUSE OF ARTICLE I OF THE FEDERAL CONSTITUTION.

Petitioner's petition for certiorari should be granted to prevent a violation of the obligation of contracts under Article I of the Federal Constitution. It is well established law, and Illinois courts have recognized, that under the contracts clause of article I, a municipality cannot renege on its contractual obligations. *Wall v. Chicago Park District*, 378 Ill. 81, 93, 94 (1941).

In the case at bar, petitioner entered into an interim settlement agreement which allowed petitioner to erect signs on three of its four leaseholds. In addition, the parties agreed that the fate of these signs would be determined by the outcome of litigation over the constitutionality of the 1983 zoning ordinance.

Petitioner gave valuable consideration for this agreement. Petitioner made calculated assumptions regarding the likelihood of success and revenue that could be gen-

erated during the course of litigation. On this basis and in exchange for the permission to erect its signs, petitioner waived any potential damage claim. Clearly, respondent was aware of these considerations, since it agreed to the interim settlement agreement in order to mitigate damages. Accordingly, it would be unfair and unreasonable to allow the respondent to benefit from petitioner's damage waiver and then refuse to give the agreement effect with respect to the petitioner's signs.

In 1987, respondent amended its zoning ordinance in apparent recognition of the unconstitutionality of the 1983 version. Respondent then argued successfully that the amended ordinance should be controlling. As a general rule, the legislature has the continuing right to amend an ordinance, even while litigation involving the ordinance is pending, and the court must decide the case based on the law in effect at the time of the decision. *Gust v. Village of Skokie*, 125 Ill. App. 3d 102, 105-06 (1984).

However, the Illinois appellate court misconstrued and misapplied the interim settlement agreement in a way that results in a violation of the obligation of contracts clause of Article I of the Federal Constitution. The agreement created in petitioner a vested right to construct and maintain signs on its property. This right could be divested only by a condition subsequent, a final determination that the 1983 ordinance was constitutional.

Petitioner has previously argued that the appellate court erred in determining that the 1987 ordinance was constitutional. Nevertheless, that court, in issuing its decision, should also have given full effect to the interim settlement agreement. Under that agreement, the signs were to stay if the 1983 ordinance was unconstitutional. Respondent all but conceded that the 1983 ordinance was unconstitutional. Accordingly, the signs must be allowed to stay in order to satisfy the interim settlement agreement.

Further, under applicable law, respondent should be estopped from forcing the petitioner to remove its signs. Illinois law provides that if a person relies to his detriment on statements or representations from a governmental authority, then the governmental body will be estopped from enforcing the ordinance against the person relying on the representations. *Fifteen Fifty State St. v. Chicago*, 15 Ill. 2d 408 (1959), *citing Deer Park Civic Ass'n v. City of Chicago*, 347 Ill. App. 346 (1952). That principle clearly applies here in that petitioner detrimentally relied on the interim settlement agreement by expending substantial sums to design and erect the signs. Respondent then amended its ordinance in 1987. Respondent was estopped from relying on the 1987 amendment to the detriment of petitioner's previously established rights.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[Filed October 10, 1990]

No. 2-89-1292

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

NATIONAL ADVERTISING COMPANY,

Plaintiff-Appellant,

v.

THE VILLAGE OF DOWNERS GROVE, THE VILLAGE OF DOWNERS GROVE ZONING BOARD OF APPEALS, GREGORY BEGGS, ANTHONY TONZ, EUGENIA KUCERA, LAURENCE MUSIELAK, and HAROLD SLAGTER,

Defendants-Appellees

(Opus Corporation, Defendant;
LaSalle National Bank, Intervenor-Defendant).

Appeal from the Circuit Court of DuPage County.
No. 88-MR-527
Hon. John W. Darrah, Judge Presiding.

JUSTICE DUNN delivered the opinion of the court:

National Advertising Co. (National) brought suit against the Village of Downers Grove (Village) challenging the constitutionality of its outdoor sign ordinance. It also sought reversal of the Village's zoning board of appeals

decision denying it a variance from the ordinance's size restrictions. The trial court granted summary judgment to Downers Grove, and National now appeals.

National is engaged in the business of outdoor advertising. It makes its signs available for commercial and noncommercial messages. In 1983, National leased property near a highway in Downers Grove's B-3 zoning district and applied for a permit to display a double-faced outdoor advertising sign measuring 14 by 48 feet on a sign structure 67 feet high. Under Downers Grove's sign ordinance, an advertising sign is defined as any sign that directs attention to a business, product, or activity available or conducted at a location other than on the zoning lot upon which the sign is located. This type of sign is also commonly known as an off-site or off-premise sign. Advertising or off-site signs are allowed in Downers Grove in one district—B-3—and signs in the B-3 district may not exceed 20 feet in height and 200 square feet in area.

Because National's proposed sign exceeded the size and height permitted in the B-3 district, it was denied a sign permit. National applied to the zoning board of appeals for a variance on the size limitation, which was also denied. It then filed this four-count complaint. In count I, National challenged the decision of the zoning board of appeals. In count II, National claimed that the zoning ordinance was impermissibly more restrictive than the provisions of the Highway Advertising Control Act of 1971 (Ill. Rev. Stat. 1987, ch. 121, par. 501 *et seq.*). This argument was raised and rejected by interlocutory appeal in *National Advertising Co. v. Village of Downers Grove* (1988), 166 Ill. App. 3d 58, resulting in the dismissal of count II.

National had also asserted in count II that it sought to display advertising signs on leased space of three prop-

erties in the M-1 district. These facts were incorporated by reference into counts III and IV. Signs in the M-1 district and the other business and manufacturing districts are permitted so long as they pertain to the business on the premises. And, there is also one exception. Noncommercial copy of any nature may be displayed in these districts as well as in the B-3 district. The size of the signs in districts other than B-3 is determined by the frontage area of the property, *i.e.*, signs in the M-1 district may not exceed one square foot per foot of lot frontage. The signs permitted in these other districts are also commonly referred to as on-site or on-premise signs.

In count III National first claimed that the zoning ordinance in effect in 1983 violated the first amendment to the United States Constitution as a content-based regulation. In 1983, the sign ordinance did not state that all noncommercial copy was permissible. It allowed only noncommercial copy related to political messages. In 1987, the Village amended the ordinance to allow all noncommercial copy. National asserted in count III that the Village improperly amended the ordinance; it also claimed that the amended ordinance violated the first amendment.

In count IV National asserted a violation of due process under the fourteenth amendment and a taking under the fifth amendment, claiming that Downers Grove had no rational basis for limiting its signs to 20 feet in height and 200 square feet in area.

In January 1985 the parties entered an interim settlement agreement that permitted National to display its sign in the B-3 district and to display signs in the M-1 district on the properties it had mentioned in count II. The agreement stated that National would be permitted to maintain such signs in the event that the sign ordinance

was found invalid; but, if valid, National would be required to remove the signs within 30 days.

The trial court found the sign ordinance valid and granted summary judgment to Downers Grove. National now raises the following issues on appeal: (1) whether the trial court erred in ruling that the 1987 amended ordinance applied to this case; (2) whether the trial court erred in granting Downers Grove summary judgment on National's first amendment claim and whether the amended ordinance violates the first amendment; (3) whether the ordinance violates due process; (4) whether National has suffered a taking under the fifth amendment; and (5) whether the court erred in affirming the decision of the Downers Grove zoning board of appeals. For the reasons stated below, we affirm.

National first contends the court erred in applying Downers Grove's 1987 amended ordinance to this case. In a twist of logic, National argues that the 1983 ordinance must apply rather than the 1987 amended ordinance that corrects the asserted unconstitutional regulation. National contends the ordinance in effect in 1983 was an impermissible content-based regulation because it allowed only one type of noncommercial message, political. The amendment did away with the content-based exception for political speech by adding an exception for all noncommercial copy.

A legislative body has a continuing right to amend an ordinance even while litigation involving the ordinance is pending, and the court must decide the case in accordance with the law in effect at the time of decision. (*Gust v. Village of Skokie* (1984), 125 Ill. App. 3d 102, 105-06; *Sagittarius, Inc. v. Village of Arlington Heights* (1980), 90 Ill. App. 3d 401, 404.) At the time the trial court decided the case by summary judgment in 1989, the 1987 amendment was in effect. Thus, the trial court properly

applied the amendment to this action. National's arguments to the contrary are without merit.

National erroneously compares this case to *Phillips Petroleum Co. v. City of Park Ridge* (1958), 16 Ill. App. 2d 555, arguing that Downers Grove wrongfully denied its applications for permits, thus preventing it from acquiring a vested right before the ordinance was amended. In *Phillips*, the plaintiff applied for a building permit in conformance with the applicable zoning ordinance. The city, however, passed a resolution to temporarily stop building permits from being issued and then amended the zoning ordinance to disallow plaintiff's intended use of the property. (*Phillips*, 16 Ill. App. 2d at 557-59.) The court determined that the city lacked the power to pass a resolution that kept building permits from being issued, and, but for the improper ordinance, plaintiff would have acquired a vested right under the zoning ordinance. (*Phillips*, 16 Ill. App. 2d at 564-66.) These facts are dissimilar to this case. Here, National's permit application did not conform to the zoning ordinance; it failed to comply with the zoning ordinance's size requirements. Furthermore, Downers Grove did not act outside its authority by enacting a temporary resolution that stopped National's permit from otherwise being issued. Downers Grove did not act in midstream to stop National from acquiring a vested right.

National also contends that it had a vested right under the 1983 ordinance. Where a law has been amended, a prior law will be recognized where to do otherwise would affect a vested right. (*Gust*, 125 Ill. App. 3d at 106; *Maiter v. Chicago Board of Education* (1980), 82 Ill. 2d 373.) National contends it obtained a vested right to erect its signs in 1983 when its permit applications were denied because the ordinance at that time violated the first amendment.

This, too, is illogical. In the first place, National has not lost a right it would have had but for the amended ordinance. The amended ordinance did not take away a property right; it added one, allowing noncommercial messages on any signs permitted under the ordinance. Secondly, National's permit was not denied because of this alleged unconstitutional provision. National's permit was denied because it proposed to erect a sign that exceeded the size allowed under the ordinance.

National contends the amended ordinance violates the first amendment on its face and, at the very least, issues of material fact require reversal of summary judgment. These arguments are not persuasive. A careful reading of the Supreme Court decision in *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882, establishes that the ordinance does not violate the first amendment, and the court did not err in granting summary judgment to Downers Grove.

In *Metromedia*, a widely fragmented court struck down a San Diego ordinance that allowed on-site commercial advertising but prohibited, with limited exceptions, all off-site advertising and all noncommercial advertising. *Metromedia*, 453 U.S. at 494, 69 L. Ed. 2d at 806, 101 S. Ct. at 2885-86.

Justice White, joined by Justices Stewart, Marshall and Powell, ruled that a municipality could bar off-site commercial signs while allowing on-site commercial signs; however, an ordinance that allowed on-site commercial signs, but prohibited on-site noncommercial signs, violated the first amendment because it provided greater protection to commercial speech. (*Metromedia*, 453 U.S. at 513, 69 L. Ed. 2d at 818, 101 S. Ct. 2895 (opinion of White, J., joined by Stewart, Marshall and Powell, JJ.).) Justices

Brennan and Blackmun concurred with the judgment, but on a completely different basis. They found the city failed to offer sufficient proof that the ordinance served substantial governmental interests that could not be served by means less intrusive on activity protected by the first amendment. (453 U.S. at 528, 69 L. Ed. 2d at 827, 101 S. Ct. at 2903 (Brennan, J., concurring, joined by Blackmun, J.).) Justice Stevens, in a partial dissent, joined the plurality opinion in holding that San Diego could bar off-site commercial advertising while allowing on-site commercial advertising but disagreed with the plurality's opinion that the San Diego ordinance violated the first amendment by disallowing noncommercial speech where on-site commercial signs were allowed. (453 U.S. at 541, 69 L. Ed. 2d at 836, 101 S. Ct. at 2909-10 (Stevens, J., partially dissenting).) Chief Justice Burger and Justice (now Chief Justice) Rehnquist dissented in separate opinions, arguing that the ordinance did not violate the first amendment as a content-based regulation. 453 U.S. at 555, 69 L. Ed. 2d at 845, 101 S. Ct. at 2917 (Burger, C.J., dissenting; 453 U.S. at 569, 69 L. Ed. 2d at 854, 101 S. Ct. at 2924 (Rehnquist, J., dissenting).

Despite the fragmented decision, it is clear from the opinion of the plurality, which was joined by Justice Stevens, along with the opinions of Justice (now Chief Justice) Rehnquist and Chief Justice Burger, that a municipality may bar off-site advertising while permitting on-site advertising. Other jurisdictions have reached this same conclusion. (See *Scadron v. City of Des Plaines* (1990), 734 F. Supp. 1437, 1447; *Georgia Outdoor Advertising, Inc. v. City of Waynesville* (4th Cir. 1987), 833 F.2d 43, 45-46; *Major Media of the Southeast, Inc. v. City of Raleigh* (4th Cir. 1986), 792 F.2d 1269, 1273, *cert. denied* (1987), 479 U.S. 1102, 94 L. Ed. 2d 185, 107 S. Ct. 1334 (1987);

Wheeler v. Commissioner of Highways (6th Cir. 1987) 822 F.2d 586, 594, *cert. denied* (1988), 484 U.S. 1007, 98 L. Ed. 2d 653, 108 S. Ct. 702.) Under the plurality opinion, a billboard restriction violates the first amendment where it bars noncommercial advertising on a sign that is permissible if the content is commercial. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages." (*Metromedia*, 453 U.S. at 513, 69 L. Ed. 2d at 818, 101 S. Ct. at 2895.) Downers Grove's ordinance falls completely in line with the plurality's opinion by permitting noncommercial copy on any signs otherwise permitted.

National argues that the ordinance fails the test set out by the plurality in *Metromedia*, or that it at least raises issues of fact that should not have been decided by summary judgment. We are not persuaded. *Metromedia* was decided by summary judgment, and *Metromedia* demonstrates that this ordinance passes the plurality's test as a matter of law. (See *Georgia Outdoor Advertising, Inc. v. Waynesville*, 833 F.2d at 45-46; *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d at 1272.) Furthermore, the ordinance in this case not only passes the test set out by the plurality in *Metromedia*, it also passes as a content neutral time, place and manner restriction. See *Rzadkowolski v. Village of Lake Orion* (6th Cir. 1988) 845 F.2d 653, 654-55; *Wheeler v. Commissioner of Highways*, 822 F.2d at 590-96.

The plurality in *Metromedia* applied two tests to the San Diego ordinance, one for its regulation of commercial speech and one for its regulation of noncommercial speech. It first applied the standard for commercial speech, stating that a restriction of commercial speech is permissible if (1) it seeks to implement a substantial governmental interest; (2) directly advances that interest; and

(3) reaches no further than necessary to accomplish the given objective. 453 U.S. at 507, 69 L. Ed. 2d at 815, 101 S. Ct. 2892; *Central Hudson Gas & Electric Corp. v. Public Service Comm'n* (1980), 447 U.S. 557, 563-66, 65 L. Ed. 2d 341, 348-51, 100 S. Ct. 2343, 2350-51.

The *Metromedia* plurality, joined by Justice Stevens, found that traffic safety and esthetics are substantial goals of a municipality. (453 U.S. at 507-08, 69 L. Ed. 2d at 815, 101 S. Ct. at 2892-93; see also *City Council v. Taxpayers for Vincent* (1984), 466 U.S. 789, 807, 80 L. Ed. 2d 772, 788, 104 S. Ct. 2118, 2130.) These same goals are espoused by Downers Grove. Its stated purpose is to protect the public health, safety and welfare by reducing signs that may cause traffic safety problems and encouraging a sense of esthetic appreciation for the visual environment. National argues that Downers Grove's asserted interests in traffic safety and esthetics are a facade for the improper ulterior motive of suppressing speech. This attack is without merit. National offers no evidence that this motive exists, and there is no reason to believe that a Village that allows on-site advertising and off-site advertising in one district has set out to suppress speech.

The plurality also found that an ordinance barring billboards was no broader than necessary. The plurality stated:

> "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." 453 U.S. at 508, 69 L. Ed. 2d at 815, 101 S. Ct. at 2893.

Finally, the plurality believed that a ban of off-site commercial billboards directly advanced the governmental interests of traffic safety and esthetics. (453 U.S. at 509-11,

69 L. Ed. 2d at 815-17, 101 S. Ct. at 2893-94.) The plurality stated that it hesitated to disagree with the accumulated, commonsense judgments of local lawmakers and the many reviewing courts that billboards are real and substantial hazards to safety. (453 U.S. at 509, 69 L. Ed. 2d at 816, 101 S. Ct. at 2893.) Likewise in this case, though National has submitted affidavits from experts attesting that the billboards do not operate as safety hazards, it is not the province of this court to say on this controversial subject whether the Village could not reasonably find otherwise.

As for the esthetic goal, the plurality stated that it is not speculative to recognize that billboards, wherever located and constructed, can be perceived as an esthetic harm. (453 U.S. at 510, 69 L. Ed. 2d at 816, 101 S. Ct. at 2893-94.) The plurality also rejected the argument that the ordinance was ineffective because the city allowed on-site billboards. (453 U.S. at 511, 69 L. Ed. 2d at 817, 101 S. Ct. at 2894.) It stated that whether on-site advertising is permitted, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. The city may believe that off-site advertising, with its periodically changing content, presents a more acute problem than does on-site advertising. 453 U.S. at 511, 69 L. Ed. 2d at 817, 101 S. Ct. at 2894.

Thus, under the plurality opinion joined by Justice Stevens in *Metromedia*, it is clear the ordinance does not violate the first amendment with regard to its regulation of commercial speech. In regard to noncommercial speech, the *Metromedia* plurality held the city to a stricter standard, ruling that it could not ban noncommercial speech where commercial speech was allowed. Downers Grove's ordinance does not violate this rule since it expressly allows noncommercial speech on all signs otherwise permitted.

The ordinance also passes constitutional muster as a proper time, place and manner restriction. The *Metromedia* plurality declined to analyze the San Diego ordinance as a content neutral time, place and manner restriction, finding that the ordinance distinguished in several ways between permissible and impermissible signs on the basis of content. (453 U.S. at 517, 69 L. Ed. 2d at 820, 101 S. Ct. at 2897.) The San Diego ordinance provided 12 exceptions to its prohibition of noncommercial signs, allowing, for example, signs of religious symbols, signs carrying news items, and temporary political signs. (453 U.S. at 494-96, 69 L. Ed. 2d at 806-07, 101 S. Ct. at 2885-86.) Unlike the San Diego ordinance, the Downers Grove ordinance does not regulate content by providing content-based exceptions to its ban on noncommercial speech. It permits noncommercial messages of all types on any signs otherwise permitted.

National contends, however, that, since the content of the sign determines whether it is permissible, *i.e.*, a sign in an on-site district must advertise the business on the premises or a noncommercial message, the ordinance is not a neutral time, place and manner restriction. This is not persuasive. The distinction between on-site and off-site advertising is not aimed toward the suppression of an idea or viewpoint. (See *Taxpayers for Vincent*, 466 U.S. at 804, 80 L. Ed. 2d at 786-87, 104 S. Ct. at 2128.) As stated by the Sixth Circuit Court of Appeals in *Wheeler v. Commissioner of Highways*, 822 F.2d at 591:

> "[T]he on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message."

See also *Scadron v. City of Des Plaines*, 734 F. Supp. at 1447-48.

The test for determining whether a viewpoint neutral regulation is sufficiently justified as a time, place and manner restriction consists of essentially the same factors addressed under the plurality's test for commercial speech. A time, place and manner restriction must (1) further an important or substantial governmental interest, (2) be unrelated to the suppression of free expression, and (3) be no greater than necessary to the furtherance of that interest. (*United States v. O'Brien* (1968), 391 U.S. 367, 377; 20 L. Ed. 2d 672, 680, 88 S. Ct. 1673, 1679.) The ordinance clearly passes this test as we have already stated. It furthers a substantial governmental interest, is no greater than necessary, and is unrelated to the suppression of speech.

The final consideration under a time, place and manner restriction is whether the remaining alternative modes of communication are adequate. (*Taxpayers for Vincent*, 466 U.S. at 812, 80 L. Ed. 2d at 791, 104 S. Ct. at 2132-33.) Though Downers Grove has not banned all off-site advertising, National contends the size restrictions for off-site advertising in effect prohibit billboard advertising because the industry does not make signs this small. And, National argues that other means of communication are not as cost effective. While these factors may be true, it is not sufficient reason to strike this ordinance. By implication the *Metromedia* plurality opinion, though it did not address the regulation under a time, place, and manner restriction, supports this conclusion. In ruling that off-site advertising may be completely banned, the plurality demonstrates that it is not concerned with denying this mode of communication to advertisers. Also, restricting this mode of communication because of its detrimental effect on traffic safety and esthetics is supported by *Kovacs v. Cooper* (1949), 336 U.S. 77, 88-89, 93 L. Ed. 513, 69 S.

Ct. 448, where the Court found that the fact that more people may be more easily reached by sound trucks is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

National offers three other unpersuasive reasons for finding that the ordinance violates the first amendment.

National contends the ordinance unconstitutionally creates more severe restrictions for off-site noncommercial signs than on-site noncommercial signs. The size restriction for on-site signs in the B-2 and B-3 district is limited to two square feet per foot of lot frontage on adjacent streets, alleys or other public ways. National asserts that some on-site signs are larger than the ones it proposes to display. Thus, it argues that the ordinance violates the first amendment by allowing on-site advertisers to post larger noncommercial signs than off-site advertisers. As already discussed, *Metromedia* held that a municipality could permit on-site advertising, while banning off-site advertising completely. If this is permissible, then it is equally permissible for a municipality to restrict to a greater degree the size of off-site signs it allows. Any disparity between the size of noncommercial off-site and on-site signs is a result of a proper time, place and manner restriction.

National next argues that the ordinance impermissibly favors commercial over noncommercial speech. It contends that on-site occupants will have a greater incentive to post commercial rather than noncommercial signs. Whether this may be true, there is no violation of the first amendment. Private decisions of the property owners, not the will of the municipality, will govern this outcome. See *Major Media of the Southeast, Inc.*, 792 F.2d at 1273.

National finally argues that, because the ordinance fails to define commercial and noncommercial copy, officials will be vested with too much discretion in determining whether a sign is permissible in a given district. According to National, the line between commercial and noncommercial is too difficult to draw with accuracy without objective criteria in the ordinance to guide the officials. This argument was rejected by the Fourth Circuit Court of Appeals in *Major Media of the Southeast, Inc.* The court stated:

> "Although the ordinance provides no definition of 'commercial' or 'non-commercial' speech, sufficient guidance is given * * * by the various decisions of the Court relating to billboards and commercial speech. We agree with the district court that 'no codification of these items is necessary since the Supreme Court has already defined them.' See *Central Hudson Gas & Elec. v. Public Service Comm'n.*, 447 U.S. 557, 561, 100 S. Ct. 2343, 2348, 65 L. Ed. 2d 341 (1980). In *Central Hudson Gas*, the court stated that commercial speech was 'expression related solely to the economic interests of the speaker and its audience.' Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague * * *." (*Major Media of the Southeast, Inc.*, 792 F.2d at 1272-73.)

We are persuaded by this analysis. The basic definition provided in *Central Hudson Gas* provides sufficient guidance to officials.

National next contends the ordinance is an unreasonable exercise of Downers Grove's police power. There is little

need for extensive analysis on this point. As stated in a footnote to the plurality's opinion in *Metromedia*, the due process clause does not afford a greater degree of protection to appellant's business than does the first amendment.

> "Since we hold that the First Amendment interests in commercial speech are not sufficient to prevent the city from prohibiting offsite commercial advertisements, no different result should be reached under the Due Process Clause." 453 U.S. at 521 n.25, 69 L. Ed. 2d at 823 n.25, 101 S. Ct. at 2899 n.25.

See also *Village of Skokie v. Walton on Dempster, Inc.* (1983), 119 Ill. App. 3d 299, 302-04 (reviewing the difference between sign ordinance and other zoning and holding that sign ordinance was reasonable where it was based upon esthetic interest of community and applied uniformly to all citizens).

Next, National contends the ordinance results in a taking of its property in violation of the fifth amendment. This argument also fails.

A land-use regulation does not constitute a taking if it substantially advances legitimate State interests and does not deny an owner economically viable use of his land. (*Nollan v. California Coastal Comm'n* (1987), 483 U.S. 825, 834, 97 L. Ed. 2d 677, 687, 107 S. Ct. 3141.) A broad range of governmental purposes and regulations satisfy these requirements. See *Agins v. City of Tiburon* (1980), 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (scenic zoning); *Penn Central Transportation Co. v. New York City* (1978), 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (landmark preservation); *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (residential zoning).

In the taking analysis, the type of taking often plays a critical role. A taking is more readily found when the interference with property can be characterized as a physical invasion by government rather than an interference that arises from some public program adjusting the benefits and burdens of economic life to promote the common good. (*Penn Central Transportation*, 438 U.S. at 124, 57 L. Ed. 2d at 648, 98 S. Ct. 2659.) Another relevant factor is the extent to which the regulation has interfered with distinct investment-backed expectations. *Penn Central Transportation*, 438 U.S. at 124, 57 L. Ed. 2d at 648, 98 S. Ct. at 2659.

Considering the above factors, it is clear National has not suffered a taking as a result of the Downers Grove's ordinance. Downers Grove has not physically invaded National's property rights. Rather, it has enacted a program that applies to everyone to promote the common good of traffic safety and esthetics, a program that, as already stated, substantially advances legitimate interests of the Village. Furthermore, there is no evidence that the owner of the property has been denied an economically viable use of his land. National is not the owner of the property; it is the lessee. Downers Grove has not interfered with National's legitimate investment-backed expectations. At all times, National had notice that its proposed signs violated the Village's ordinance. "Purchasers who acquire property with the expectation of using it for a purpose not permissible under current zoning restrictions should not expect loss resulting from denial of the proposed use to be a persuasive argument in securing the change." *Lapkus Builders, Inc. v. City of Chicago* (1964), 30 Ill. 2d 304, 310.

In its final argument, National contends the Downers Grove zoning board of appeals decision denying its peti-

tion for a variance is against the manifest weight of the evidence. The zoning ordinance provides that variances are to be granted where the literal enforcement of the ordinance would do manifest injustice or be contrary to the spirit and purpose of the ordinance. The facts do not demonstrate that the board of appeals acted against the manifest weight of the evidence. The evidence shows that National proposed to erect signs with a square footage three times the size allowed under the ordinance. Thus, enforcing the ordinance in this case was not contrary to the purpose of the regulation; it was in furtherance of it. Furthermore, as already stated, National was fully aware at the time that it leased the property that its signs violated the ordinance. There has been no manifest injustice.

Lastly, we address the motion filed by Downers Grove that was ordered taken with the case. Downers Grove filed a motion to strike a portion of National's reply brief in which National asserted at page 19 that a case cited by Downers Grove, *John Donnelly & Sons v. Mallar* (D. Me. 1978), 453 F. Supp. 1272, at 35, 50, and 51, was overturned on the very proposition upon which Downers Grove relied by *John Donnelly & Sons v. Campbell* (1st Cir. 1980), 639 F.2d 6. These cases predate *Metromedia.* Therefore, they are of little value to the resolution of this case. Nonetheless, Downers Grove accurately points out that National's reference to the first circuit case is inaccurate and misleading. It is clear that the proposition for which Downers Grove cited the lower court case was not overturned by the first circuit. Moreover, National's quotation from the concurring opinion in *Campbell* is misleading. National fails to inform this court that the quotation is not from the majority opinion and that this quote does not form the basis for the majority's opinion. According-

ly, the aforementioned portion of National's reply brief is stricken.

The judgment of the circuit court is affirmed.

Affirmed.

GEIGER and WOODWARD, JJ., concur.

UNITED STATES OF AMERICA

State of Illinois
Appellate Court
Second District—ss.

I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 10th day of October, A.D. 1990.

/s/ LOREN J. STROTZ
Clerk Appellate Court, Second District

APPENDIX B

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 6, 1991

Mr. Thomas J. Cisar
Cisar & Gaddy
823 Commerce Drive S270
Oak Brook, IL 60521

No. 71291—National Advertising Company, petitioner, v. The Village of Downers Grove et al., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 28, 1991.

APPENDIX C

ARTICLE IX – SIGNS

SECTION 1 – PURPOSE

The regulations set forth herein are established in order to promote and protect generally public health, safety, comfort, prosperity and welfare and in order to accomplish the following specific purposes:

1.1 To enhance the economy, business and industry of the Village by promoting the reasonable, orderly, and effective use and display of signs.

1.2 To enhance the physical appearance of the Village.

1.3 To protect the general public from damage and injury which might be caused by the faulty and uncontrolled constructior and use of signs within the Village.

1.4 To protect the public use of streets and highways by reducing sign or advertising distractions that may increase traffic accidents.

1.5 To protect the physical and mental well being of the general public by recognizing and encouraging a sense of aesthetic appreciation for the visual environment.

1.6 To preserve the value of private property by assuring the compatibility of signs with surrounding land uses.

SECTION 2 – GENERAL CONSTRUCTION, MATERIAL, LOCATION AND PERFORMANCE STANDARDS

2.1 *Electrical Requirements*

2.1-1 The electrical components, connections, and installations of all signs shall conform to the Electrical Code of the Village and all regulations promulgated thereunder.

2.1-2 In no case shall such electrical wiring be exposed to the view of, or access by, the public.

2.2 *Wind Pressure and Load Requirements.* All permanent exterior signs shall be designed to withstand a wind pressure of not less than thirty (30) pounds per square foot of area.

2.3 *Gooseneck Reflectors and Lights.* Gooseneck reflectors and lights shall be permitted on permanent freestanding signs, wall signs, projecting signs and roof signs, provided that any such reflectors or lights shall be installed only in a manner such that the direct rays of such reflectors or lights are concentrated on the sign and are directed, shielded or otherwise constructed so as to avoid any glare on the adjacent street or adjacent properties.

* * * * *

h. Rummage or garage sale signs
i. Political campaign signs
j. Developers' temporary signs
k. Signs on public utility facilities or public facilities
l. Freestanding signs accessory to a permitted non-residential use, provided that the height of such sign shall not exceed six (6) feet and the surface area of such sign shall not exceed twenty (20) square feet
m. Professional office signs

4.1-2 Such signs may be located in any required yard but not less than five (5) feet from any side lot line nor less than five (5) feet from any lot line adjacent to a street except as otherwise provided in this Ordinance.

4.1-3 Unless specifically provided otherwise in this Section, no sign shall extend ten (10) feet in height.

4.1-4 *Content*: Except for political campaign signs and rummage or garage signs, content shall be limited to the business, product, and activity available or conducted on the zoning lot.

4.2 *R-5A and R-6 Districts*

4.2-1 *Permitted Sign Types*

a. Signs permitted in Subsection 4.1-1 of this Section
b. Building identification signs

4.2-2 Same as in paragraph 4.1-2 of this Section.

4.2-3 Same as in paragraph 4.1-3 of this Section.

4.2-4 *Content:* Same as in paragraph 4.1-4 of this Section.

SECTION 5 – BUSINESS AND MANUFACTURING DISTRICTS

In all business and manufacturing zoning districts only the following signs are permitted.

5.1 *B-1 District*

5.1-1 *Permitted Sign Types*

a. Awning and canopies
b. Freestanding signs not exceeding 20 feet
c. Wall signs
d. Window signs

e. Window promotional signs
f. Contractors' signs
g. Signs accessory to parking areas
h. Directional signs within the public right-of-way
i. Real estate signs
j. Political campaign signs
k. Developers' temporary signs
l. Window displays
m. Temporary external signs
n. Projecting signs
o. Signs on public utility facilities or public facilities

5.1-2 *Number*: There shall be no more than one freestanding sign for each zoning lot, provided that lots that have frontage on two arterial or collector streets may have one freestanding sign on each street frontage. All other types of signs shall be controlled by the area requirements of the zoning district and the limitations imposed by Sections 3 and 4 of this Article.

5.1-3 *Area*: The total amount of sign surface area permitted on a zoning lot shall not exceed one (1) square foot per front foot of lot frontage on an arterial or collector street.

Content:

5.1-4 Except for political campaign signs, no sign shall contain any words, letters or numbers other than the business name, symbol, the major business, address, or phone number, of the establishment, or any combination thereof.

5.2 *B-2 District*

5.2-1 *Permitted Sign Types*

a. Signs permitted in the B-1 district
b. Marquees

c. Temporary external signs as regulated
d. Roof signs, provided that the sign may be no more than six (6) feet in height or more than 20 feet above grade, whichever is lower.
e. Exterior rate signs

5.2-2 *Number*: There shall be a minimum of 100 feet of separation between freestanding signs on the same zoning lot as measured along the street frontage.

5.2-3 *Surface Area*: The total area of signs permitted on a zoning lot shall not exceed two (2) square feet per foot of lot frontage on all adjacent streets, alleys or other public ways.

Content:

5.2-4 Except for political campaign signs, content shall be limited to the business, product, or activity available or conducted on the zoning lot.

5.3 *B-3 District*

5.3-1 *Permitted Sign Types*

a. Signs permitted in the B-2 zoning district
b. Roof signs provided that maximum height shall not exceed fifteen (15) feet above the top of the roof.
c. Advertising signs not exceeding 20 feet in height and 200 square feet in area.

5.3-2 *Number*: Same as in paragraph 5.2-2 of this Section.

5.3-3 *Surface Area*: Same as in paragraph 5.2-3 of this Section.

5.3-4 *Content*: With the exception of advertising signs and political campaign signs, content shall be limited to the business, product or activity available or conducted on the zoning lot.

5.4 *M-1, M-2, O-R and O-R-M Districts*

5.4-1 *Permitted Sign Types*

a. Freestanding signs
b. Wall signs
c. Signs accessory to parking areas
d. Directional signs in the public right-of-way
e. Real estate signs
f. Ornamental or entry gate signs
g. Window display
h. Political campaign signs
i. Developers' temporary signs
j. Signs on public utility facilities or public facilities

5.4-2 *Surface Area*: Maximum total surface area of all signs on a zoning lot in an M-1, M-2, O-R or O-R-M zoning district shall not exceed one square foot per foot of lot frontage.

5.4-3 *Height*: Freestanding signs shall not exceed six feet in height.

Special provision: Signs on lots in the M-1 zoning district with frontage on Ogden Avenue may conform to the provisions of Subsection 5.3 of this Section.

5.4-4 *Content*: Except for political campaign signs, content shall be limited to the business, product, or activity available on the zoning lot.

APPENDIX D

1/87 Text Amendment — Signs

ORDINANCE NO. 3048

AN ORDINANCE AMENDING THE COMPREHENSIVE ZONING ORDINANCE OF THE VILLAGE OF DOWNERS GROVE, ILLINOIS PASSED AND APPROVED APRIL 19, 1965, AS AMENDED

WHEREAS, the Council of the Village of Downers Grove, DuPage County, Illinois, has heretofore adopted an ordinance entitled "Comprehensive Zoning Ordinance of the Village of Downers Grove, Illinois", passed and approved April 19, 1965, (which ordinance, as heretofore amended, is hereinafter referred to as the "Zoning Ordinance"); and

WHEREAS, certain amendments to the Zoning Ordinance have heretofore been proposed in the manner provided therein, and it appears that the Zoning Commission of the Village has given the required public notice and has conducted a public hearing respecting said proposed amendments, all in accordance with applicable law, and has recommended that certain amendments to the Zoning Ordinance be adopted; and

WHEREAS, the Council of said Village deems it to be necessary or desirable to promote the health, welfare and safety of the residents of said Village to adopt certain amendments to the Zoning Ordinance as hereinafter provided,

NOW, THEREFORE, BE IT ORDAINED by the Council of the Village of Downers Grove, in DuPage County, Illinois, as follows:

SECTION 1. That Article III of the Zoning Ordinance is hereby amended by adding to the subparagraph entitled, *Sign, Advertising,* directly before the word "message," the word "noncommercial."

SECTION 2. That Article IX, Section 4.1-4 of the Zoning Ordinance is hereby amended by deleting that section in its entirety and substituting in lieu thereof the following:

> Except for signs containing noncommercial copy of any nature and rummage or garage sale signs, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot.

SECTION 3. That Article IX, Sections 5.1-4, 5.2-4, and 5.4-4 of the Zoning Ordinance are hereby amended by deleting those sections in their entirety and substituting in lieu thereof the following:

> Except for signs containing noncommercial copy of any nature, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot.

SECTION 4. That Article IX, Section 5.3-4 of the Zoning Ordinance is hereby amended by deleting that section in its entirety and substituting in lieu thereof the following:

> Except for signs containing noncommercial copy of any nature and advertising signs, content of signs shall be limited to the business, product, and activity available or conducted on the zoning lot.

SECTION 5. That all ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION 6. That this ordinance shall be in full force and effect from and after its passage and publication in pamphlet form as provided by law.

/s/ BETTY M. CHEEVER
Mayor

Passed: March 9, 1987

Published: March 9, 1987

Attest: /s/ BARBARA WALDNER
Village Clerk